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No. 93-1318

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, ET AL.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE TRANSPORTATION CLAIMS & PREVENTION COUNCIL IN SUPPORT OF PETITIONER THE INTERSTATE COMMERCE COMMISSION

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QUESTION PRESENTED

Whether a carrier can penalize a shipper for late payment of freight charges, when the carrier fails to comply with the Interstate Commerce Commission's regulations governing carriers' extension of credit.

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BRIEF OF *AMICUS CURIAE* THE TRANSPORTATION CLAIMS & PREVENTION COUNCIL IN SUPPORT OF PETITIONER THE INTERSTATE COMMERCE COMMISSION

INTEREST OF AMICUS CURIAE[1]

The Transportation Claims and Prevention Council, Inc. ("TCPC") is a voluntary, not for profit organization of approximately 650 firms nationwide. TCPC's primary purpose is to represent shipper interests in transportation claim issues, such as the undercharge claims by carriers' Trustees against shippers. TCPC has sponsored numerous

[1] Both parties to this case have consented to the filing of this brief.

Joint Defense Groups to assist its members in obtaining a cost-effective defense against these claims. Some of these Joint Defense Groups involved undercharges based on loss of discount for late payment of freight charges, namely, claims filed by the trustees for Transcon Lines, P*I*E Nationwide, Friedman's Express, St. Johnsbury Trucking and others. Thus. millions of dollars in undercharge claims are at stake.

TCPC, therefore, has a direct interest in the issues presented herein. It supports the position of the Interstate Commerce Commission and the United States of America.

SUMMARY OF THE CASE

I. The Proceedings Below

This case forms the latest installment in a series of recent decisions reviewed by this Court involving the "filed rate doctrine" first announced in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915), and more recently revisited in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), *Reiter v. Cooper*, 113 S. Ct. 1213 (1993), and *Security Services, Inc. v. Kmart Corp.*, 93-284, ___ S. Ct. ___, 1994 WL 183598 (May 16, 1994). This is also the second review of this case by this Court. On June 14, 1993, this Court vacated the decision of the Ninth Circuit in *I.C.C. v. Transcon Lines*, 990 F.2d 1503 (1993), remanding it with instructions to reconsider its decision in light of *Reiter v. Cooper*. The Ninth Circuit Court of Appeals apparently declined to change its opinion, stating:

> It is not necessary in this case to decide whether the ICC's reading – that *Reiter* applies not only to the claims of shippers but also to the claims of the ICC – is correct. For even if it is, the Commission has failed to demonstrate that our decision in *Transcon* was wrong.

I.C.C. v. Transcon Lines, 9 F.3d 64 (1993), Pet. at 5a. The decision below is erroneous because it ignores a specific statutory directive from Congress to the I.C.C. (49 U.S.C. § 10743(b)(1)) and falls within the exception to the filed rate doctrine reiterated in *Reiter v. Cooper*.

II. The Regulatory Scheme

The Interstate Commerce Act ("I.C.A.") requires that a carrier receive full payment of freight charges prior to releasing the goods to the shipper or consignee. However, the I.C.A. allows a carrier to release goods without full payment of the freight charges *if its does so pursuant to I.C.C. regulations*. 49 U.S.C. § 10743(b)(1). Pursuant thereto, the Commission promulgated 49 C.F.R. § 1320 setting forth the conditions under which the carriers may penalize shippers for paying freight charges later than a carrier's credit terms. Pet. Appendix H at 80a. Transcon failed to comply with these conditions, and therefore, is precluded from assessing the penalties sought in its actions against its former customers.

III. This Case

Transcon was a motor common carrier with operating authority from the Interstate Commerce Commission. It filed tariffs with the I.C.C. containing nondiscounted

class rates and discounts off those rates. Transcon's tariff also contained a so-called "loss of discount" provision in the rules section of its tariff. The "loss of discount" provision was authorized by the I.C.C.'s regulations governing a carrier's extension of credit. The credit regulations allow Transcon to assess a penalty to a shipper who paid the freight bill late. 49 C.F.R. § 1320.2(g)(1)(i) and (ii). Under the I.C.C.'s regulations, a carrier may either assess liquidated damages (a sum certain or percentage of the freight charges) or require the shipper to pay the nondiscounted tariff rate (i.e., the difference between the discounted and the nondiscounted rates constituting the carrier's liquidated damages) to compensate it for the additional administrative expense of collecting freight charges. 49 C.F.R. § 1320.2(g)(1)(i) and (ii). Transcon chose the latter method. However, the regulations mandate that the carrier give notice on each freight bill that failure to pay freight charges within the carrier's credit period may subject the shipper to penalties. 49 C.F.R. § 1320.3(c). Transcon failed to place said warning on its freight bills. Transcon also failed to file its claims in accordance with the procedures specified in the Commission's regulations. 49 C.F.R. § 1320.2(g)(2)(iii) (the damages shall be applied only to the original, separate, and independent freight bills, not to aggregate balance due bills by bankruptcy trustees) and 49 C.F.R. § 1320.2(g)(2)(iv) (balance dues must be issued within 90 days after expiration of the credit period).

Transcon elicited traffic from shippers by filing discounts in its tariff. When Transcon delivered the shipments, the shipper paid the freight charges on the freight bills without knowledge of Transcon's loss of discount

tariff provision. The freight bills did not contain a notice about the payment period or loss of discount tariff provision for untimely payment, as required by the I.C.C.'s regulation. Transcon accepted the shipper's late payment without demand for the undiscounted rate as liquidated damages. Only after Transcon went bankrupt did the Trustee seize upon the carrier's loss of discount tariff provision to collect more money from Transcon's former customers.

SUMMARY OF THE ARGUMENT

The Interstate Commerce Act permits common carriers to extend credit to shippers, but only when they comply with I.C.C. regulations governing their extension of credit. In creating a "gap" in the statute regarding the extension of credit, Congress specifically authorized the I.C.C. to promulgate regulations. Since the I.C.C.'s regulations are the result of a Congressional directive, the I.C.C. is acting at the zenith of its authority and its regulations should be accorded great deference by the courts. The I.C.C.'s regulations are a self-help remedy which allow the carrier to collect liquidated damages from a shipper who pays freight charges late. However, the regulations set forth caveats for carriers enforcing their tariff's credit rules. Transcon violated those regulations in several significant ways: 1) it did not show the credit period on the freight bill; 2) it did not place a warning about the loss of discount for untimely payment on the original freight bill; 3) it did not issue a revised invoice assessing the undiscounted rate within ninety days of the credit period's expiration; and 4) Transcon's

Trustee issued aggregate balance due bills. Therefore, its Trustee may not reap windfall profits from Transcon's violation of federal law.

Transcon cannot "have it both ways." It solicited and obtained its shippers' traffic to the exclusion of its competitors by not notifying its customers on its freight bills that the failure to pay freight charges within its credit rules would result in a penalty. Had Transcon billed its customers penalty charges upon expiration of its credit period, they would have actual notice of Transcon's credit rules and had the option of diverting their traffic to competitors without a penalty rule.

Under the circumstances, Transcon is precluded from enforcing its penalties and it is bound to collect only the initial discounted freight charges published in its tariff. Stated differently, Transcon is precluded from applying the penalty provisions in its tariff for failure to comply with the Commission's regulations promulgated pursuant to a clear statutory directive.

ARGUMENT

I. THE I.C.C. EXERCISED ITS PLENARY AUTHORITY REGULATING A CARRIER'S EXTENSION OF CREDIT

A. The I.C.A. Restricts Common Carriers' Extension of Credit to Shippers

The Interstate Commerce Act mandates that a carrier

> shall give up possession at destination of property transported by it *only* when payment for the transportation or service is made.

49 U.S.C. § 10743(a) (emphasis added). However, that section carves out an exception to the statutory prohibition on the extension of credit:

> *Under the regulations of the Commission* governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service.

49 U.S.C. § 10743(b)(1) (emphasis added). Thus, Congress statutorily granted the I.C.C. a specific authority: the power to regulate the terms of payment between common carriers and shippers for transportation services. In promulgating, interpreting and enforcing its regulations governing a carrier's extension of credit, the I.C.C. is acting at the zenith of its authority. This Court has held that:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such regulations are given controlling weight unless

> they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[ ]

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (footnote omitted). *See also, Security Services, Inc. v. Kmart Corp.*, 93-284, ___ S. Ct. ___, 1994 WL 183598, *7 n. 2 (May 16, 1994); *Udall v. Tallman*, 380 U.S. 1, 17 (1965). The extension of credit is clearly a statutory "gap" explicitly left for the I.C.C. Therefore, it is Congress, not the I.C.C., which has said that a carrier may extend credit (and presumably, collect liquidated damages for late payment) only when it complies with the Commission's regulations.[2]

B. The I.C.C.'s Regulations Allow Liquidated Damages, Not an Undercharge Liability

The I.C.C.'s credit regulations allow a carrier to assess charges for late payment by issuing either: 1) a separate freight bill reflecting the charges constituting the carrier's liquidated damages for the shipper's untimely payments; or 2) a revised freight bill seeking the undiscounted filed rate. 49 C.F.R. § 1320.2(g)(1)(i) and (ii). Thus, the I.C.C.'s credit regulations require that carrier's

[2] There is no evidence that Transcon ever challenged the regulations at issue when they were promulgated in 1988. I.C.C. Pet. for Cert. Reply Brief at 2.

give shippers *actual* notice of its credit period and the amount of liquidated damages. 49 C.F.R. § 1320.3(c)

The purpose of the I.C.C.'s "loss of discount" provision was not to penalize shippers for failing to pay the freight bills in a timely fashion. *The Mennen Company v. Campbell 66 Express, Inc., et al.*, No. MC-C-30135, 1989 WL 239321 (Sept. 6, 1989), *aff'd sub nom, Delta Traffic Service, Inc. v. The Mennen Company*, 730 F. Supp. 1309 (D. N.J. 1990), *aff'd*, 919 F.2d 134 (3rd Cir. 1990). Rather, it was intended to serve as liquidated damages for the expenses that carriers presumably would incur collecting the unpaid charges. The goal was to reimburse carriers for collection expenses and not to merely give them additional revenue. *See*, 49 C.F.R. § 1320.2(g). In this case, there is no evidence that collection expenses were ever incurred by Transcon before it discontinued operations.

II. TRANSCON'S COMPLIANCE WITH THE I.C.C.'S CREDIT REGULATIONS IS A CONDITION PRECEDENT TO TRANSCON'S ENFORCEMENT OF ITS LOSS OF DISCOUNT TARIFF PROVISION

The Commission's regulations allow a carrier to extend credit by "tak[ing] reasonable actions to secure payment of the tariff charges." 49 C.F.R. § 1320.2(a)(2). To ensure payment, the regulations enable the carrier to institute late payment charges upon expiration of the credit period, but it must notify shippers that: the rule bars late paying shippers from "free use of funds;" the carrier does not condone late payment; and the carrier may not extend credit to a delinquent shipper. 49 C.F.R. § 1320.2(e)(3)(i) and (ii).

If a carrier chooses to employ a loss of discount tariff provision for its liquidated damages (as Transcon did), the regulations require that the tariff "identify the discount rates that are subject to the condition precedent and which require the shipper to make payment by a date certain." 49 C.F.R. § 1320.2(g)(1)(ii). The carrier must state in its tariff rule "the exact amount of the [liquidated damages] charges" either as a dollar figure or percentage of the freight bill, as well as the credit period "within which the shipper must pay to avoid such liquidated damages." 49 C.F.R. § 1320.2(g)(1)(i).

A. The I.C.C.'s Credit Regulations Require Actual Notice to Shippers of Transcon's Loss of Discount Provision

The carrier must do more than insert a credit period and liquidated damages provision in its tariff. First, the liquidated damages must be stated in the tariff. 49 C.F.R. § 1320.2(g)(2)(i). Second, the liquidated damages must be applied in a non-discriminatory manner. 49 C.F.R. § 1320.2(g)(2)(ii). Third, liquidated damages cannot be applied on "aggregate balance due claims," but rather the late payment fee must be assessed on "original, separate, and independent freight bills." 49 C.F.R. § 1320.2(g)(2)(iii). Fourth, liquidated damages do not apply where there is a clerical error. 49 C.F.R. § 1320.2(g)(2)(iv). Fifth, liquidated damages do not apply where the carrier's bill of lading already provide for the shipper's liability for those fees. 49 C.F.R. § 1320.2(g)(2)(v). Finally, liquidated damages are to be applied after the credit period expires where *the carrier* has generated a "revised" invoice or notice within ninety

days of the credit period's expiration date. 49 C.F.R. § 1320.2(g)(2)(vi).

There is, however, an important section of the regulation which must be read in conjunction with the sections cited above. Section 1320.3(c) states:

> (c) *Bills or accompanying written notices shall state penalties for late payment, credit time limits and service charge and/or collection expense charge and discount terms.* When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bills presented at one time shall state that "failure timely to pay freight charges may be subject to tariff penalties" (or a statement of similar import). The bills or other notice shall also state the time by which payment must be made and applicable service charge and/or collection expense charge and discount terms.

49 C.F.R. § 1320.3(c). The Commission directed that the carrier would state on the freight bill itself the applicable discount and payment period as well as the nondiscounted rate required if the shipper made an untimely payment.

Unlike the filed rate doctrine which operates upon constructive notice, the I.C.C.'s credit regulations require actual notice of the rates to the shipper. It is this point upon which the Ninth Circuit's decision errs. It held in its original opinion:

> Regulations, however valid in other contexts, cannot furnish the reason for letting the carrier abandon the filed rate. The ICC's interpretation of these regulations to allow such a result then has no greater force than the policy rejected in

> *Maislin*. Although the Act authorizes the ICC to regulate the carrier credit, the filed rate doctrine trumps the manner in which the ICC seeks to regulate carrier credit in this case, just as in *Maislin* it trumped the policy the ICC had adopted pursuant to its statutory authority to determine the reasonableness of a practice. The filed rate requirement, as *Maislin* holds, is controlling.

I.C.C. v. Transcon Lines, 990 F.2d 1503 (9th Cir. 1993), Pet. at 32a. The Ninth Circuit failed to understand that the carrier's collection of liquidated damages is not a byproduct of the filed rate doctrine, but the I.C.C.'s credit regulations. The court of appeals' reliance on *Maislin* is misplaced since the Commission's Negotiated Rates Policy conflicted with the plain language of the I.C.A. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 117, 130 (1990). In the case at bar, the regulations are authorized by the statute itself and thus, no conflict exists because Congress delegated authority to the I.C.C. to fill a specifc "gap" purposely left in the statute.

In essence, the I.C.C.'s credit regulations are a self-help remedy for carrier's who extend credit, without resorting to the courts. However, in order to take advantage of those regulations, the carrier must comply with the I.C.C.'s regulations as a condition precedent to exercising its credit rule remedy.

III. THE FILED RATE DOCTRINE IS NOT ABSOLUTE

A. *Maislin* and Its Progeny Limit the Filed Rate Doctrine

The trustees of bankrupt carriers would interpret this Court's recent decisions as holding the collection of undercharges based on the filed rate doctrine as an absolute right. However, the trustees' view would elevate the filed rate doctrine above the other principles of the Interstate Commerce Act and deny the Commission's statutory mandate and discretionary powers. This view does not comport with the case law.

While the Court held in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), that a bankrupt carrier could recover undercharges because the I.C.C.'s Negotiated Rates Policy violated the filed rate doctrine, it defined the parameters of the filed rate doctrine in *Reiter v. Cooper*, 113 S. Ct. 1213 (1993):

> Respondents contend that the so-called "filed rate doctrine" gives them absolute entitlement to judgment on their undercharge claims, without defense or counterclaim. We disagree. The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. . . . It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses *specifically accorded by the ICA itself*.

Id. at 1219 (citations omitted and emphasis added). The Ninth Circuit failed to recognize that the Court circumscribed the filed rate doctrine in *Reiter* in relation to the other sections of the I.C.A. Although *Reiter* is instructive as to the limits of the filed rate doctrine in an undercharge case against a *shipper*, it does not answer the question presently before the Court: whether the I.C.C. can enjoin a carrier from collecting liquidated damages when the carrier fails to comply with the Commission's credit regulations.

B. This Court's Decision in *Security Services v. Kmart* Requires Deference to the I.C.C.'s Credit Regulations

This Court recently upheld the I.C.C.'s "void-for-nonparticipation" regulation in *Security Services, Inc. v. Kmart Corp.*, 93-284, ___ S. Ct. ___, 1994 WL 183598 (May 16, 1994) (*"Kmart"*), and affirmed two basic principles: the I.C.C.'s authority over tariff form, and judicial deference to an agency's interpretation of its regulations. Thus, the Court acknowledged the I.C.C.'s

> authority to "prescribe the form and manner" of tariff filing, § 10762(b)(1), and the information to be included in tariffs beyond any matters required by statute, § 10762(a)(1).

Id. at *3. This statutory authority is axiomatic since the I.C.A. regulates extensions of credit by a carrier. Thus, the only legal source of Transcon's tariff rule governing its extension of credit is the Commission's regulations.

In upholding the I.C.C.'s "void-for-nonparticipation" regulation in *Kmart*, the Court held

> Petitioner argues that the effect of the void-for-nonparticipation rule is to allow transactions to be governed by secretly negotiated rates, rather than the publicly filed rates mandated by the Act. Petitioner would thus have us see the ICC's recent enforcement of its void-for-nonparticipation regulations as merely an attempt to evade *Maislin* and undermine the filed rate doctrine by keeping trustees or debtors-in-possession from recovering undercharges.

Id. at *5. This is precisely the argument Transcon advances, and the Ninth Circuit adopted. The Ninth Circuit held that to allow the I.C.C. enjoin a carrier from seeking liquidated damages because of its credit regulations would "permit an end-run around the filed rate doctrine." *I.C.C. v. Transcon Lines*, 9 F.3d 64, 66 (9th Cir. 1993), Pet. App. A at 6a. This Court rebuffed such an argument in *Kmart* stating:

> The argument is an odd one.[ ] The filed rate requirement mandates that carriers charge the rates filed in a tariff. We held in *Maislin, supra*, that the requirement was not subject to discretionary enforcement when raised against a shipper who had agreed with a carrier to a negotiated rate lower than the rate on file. When the carrier's bankruptcy prompted second thoughts about the wisdom of the agreement, the carrier and its creditors obtained the benefit of the requirement. Here, as in *Jasper Wyman, supra*, the carrier seeks to escape its burden by recovering for undercharges even though in effect it had no rates on file because its tariff lacked an essential element. The filed-rate rule applied here to bar the carrier's recovery is the same rule that was applied to bar the shipper's

> defense. Nor is the rule somehow more technical or less equitable when applied against Security Services. It can hardly be gainsaid that a carrier employing distance rates without purporting to be bound by stated distances would be just as well placed to discriminate among shippers by measuring with rubber instruments as it would be by charging shippers for a stated distance at mutable rates per mile. While some may debate in other forums the wisdom of the filed rate doctrine, it is enough to say here that the carriers cannot have it both ways.[ ]

Kmart, at *5 (footnotes omitted). The filed rate doctrine charges shippers with notice of the penalties published by Transcon in its tariff for late payment of freight charges. However, shippers are also charged, as are carriers, with constructive notice of the Commission's regulations requiring the printing of warnings on freight bills that the failure to pay on time may incur penalties. Transcon ignored that requirement, for if it had complied, its shippers would certainly have diverted their traffic to carriers that opted not to impose such penalties. Transcon continued to accept shipments without enforcing its credit rules, thus enjoying the revenue at discounted rates, and may not now collect additional revenues when shippers no longer have the option of choosing competitive carriers not imposing penalties. The Commission's regualtions thus implement Congress' objective when enacting the Motor Carrier Act of 1980 to make the motor carrier industry more competitive. *Security Services, Inc. v. Kmart Corp.*, 93-284, ___ S. Ct. ___, 1994 WL 183598, *4.

Furthermore, the Court recognized that the I.C.C.'s

> interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945). The ICC's interpretation is neither.

Security Services, Inc. v. Kmart Corp., 93-284, ___ S. Ct. ___, 1994 WL 183598, *7 n. 2 (May 16, 1994). Here, it is the application of the I.C.C.'s credit regulations and the effect of Transcon's noncompliance with those regulations which are at issue. The rationale applied by the Court in *Kmart*, however, is warranted in the instant case as well because the Ninth Circuit's decision rests on two faulty assumptions.

First, the court assumed that there is a conflict between the filed rate doctrine and the I.C.C.'s credit regulations. Whatever conflict the Ninth Circuit perceived has been resolved by *Kmart*. In that case, the I.C.C.'s void-for-nonparticipation rule was more drastic than the credit regulations since it voided a carrier's tariff *ab initio* if it did not participate in the mileage guide. The majority in *Kmart* was not troubled by the result of their decision which left unfiled contract rates intact without collection of the filed rate because the carrier had an incomplete tariff. Here, the "conflict" is between a liquidated damages tariff rule and its legal source (i.e., the I.C.C.'s credit regulations). To the extent that the Ninth Circuit relied upon *Overland Express, Inc. v. I.C.C.*, 996 F.2d 356 (D.C. Cir. 1993), *pet. for cert. granted, judgment vacated and remanded*, 62 U.S.L.W. 3420 (U.S. May 23, 1994) (No. 93-883) and *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993), *pet. for cert. granted, judgment vacated and remanded*, 62 U.S.L.W. 3503 (U.S. May 23, 1994) (No.

93-1129), in its decision on remand as authority for striking down an I.C.C. regulation because of the filed rate doctrine, the Ninth Circuit must be reversed in light of this Court's decision in *Kmart*. *See*, 9 F.3d 64, 66-67 (1993), Pet. at 7a-8a.

Secondly, the Ninth Circuit assumed that the timely payment of freight charges as a condition precedent to a shipper receiving the discount somehow converts that discount into an unfiled negotiated rate which deprives the carrier of its lawful tariff rate. But unlike the facts in *Kmart*, the undercharges that Transcon's trustee seeks to collect is the difference between two filed rates. Thus, Transcon is not in the same predicament as the carrier in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982) ("Commercial Metals"), where no freight charges were paid. More importantly, the Ninth Circuit misunderstood that it is the policy behind the filed rate doctrine which is at the heart of this case: without complying with the I.C.C.'s credit regulations, a carrier would be free to discriminate by altering credit terms for favored shippers and revoking filed discounts for less favored shippers.

C. Only the I.C.C. May Enforce Its Credit Regulations

In *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982), this Court held that a carrier's violation of the I.C.C's credit regulations does not afford a shipper an equitable affirmative defense to an undercharge action. The Court has reaffirmed that a shipper has no equitable defenses to an undercharge

claim, but only those defenses accorded to a shipper by the I.C.A. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990); *Reiter v. Cooper*, 113 S. Ct. 1213, 1219 (1993). However, the Court noted that "the intent of the [credit] rules was to protect carriers, not to penalize them." *Commercial Metals*, at 345. The rationale behind the Court's holding in *Commercial Metals* was that

> Courts were concerned that a rule permitting selective estoppels would defeat the anti-discriminatory purpose of the Act and would weaken the capital structure of common carriers.

Id. at 346. However, the purpose of the rule to protect the carrier extending credit is balanced by the regulation's protection of the shipper from a carrier abusing its credit rules in an undercharge action by prohibiting "aggregate balance dues." 49 C.F.R. § 1320.2(g)(2)(iii). Since *Commercial Metals* holds that a shipper cannot defend an undercharge based on the carrier's violation of the I.C.C.'s credit regulations, then how can the credit regulations be enforced if the I.C.C. is not permitted to enjoin Transcon? This Court held in *Commercial Metals* that "[t]he remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper." *Id.* at 352. In this light, the Ninth Circuit's refusal to allow the I.C.C. to enjoin Transcon becomes patently absurd. If the I.C.C. cannot enjoin Transcon in this context, the courts would defeat the very "antidiscriminatory purpose of the Act" which *Commercial Metals* sought to uphold.

1. This Court's Precedents Seek Balance Between Carriers and the I.C.C.

The same rationale for balance between protecting the carrier and the I.C.C.'s authority applied in *Commercial Metals* compelled the Court to limit the I.C.C.'s power to reject a carrier's tariff because

> Rejection of an effective tariff applies retroactively, and can have serious consequences for affected motor carriers. Rejection renders the tariff void *ab initio*. . . . As a result, whatever tariff was in effect prior to the adoption of the rejected rate becomes the applicable tariff for the period during which motor carriers charged the rejected tariff.

I.C.C. v. American Trucking Associations, Inc., 467 U.S. 354, 359 (1984) (citations omitted). The Court was concerned that carrier would be exposed to overcharges, and therefore, held that

> The Commission's authority under the Interstate Commerce Act is not bounded by the powers expressly enumerated in the Act. 49 U.S.C. § 10321(a). As we have held in the past, the Commission also has discretion to take actions that are " 'legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory authority.' " . . . *We have recognized that the Commission may elaborate upon its express statutory remedies when necessary to achieve specific statutory goals.* In this case, the Commission argues that the retroactive rejection of rate-bureau tariffs is simply an adjunct to the Commission's § 10762(e) rejection authority, and that, to the extent that there is an elaboration on

> that authority, it is necessary to ensure compliance with rate-bureau agreements. In these narrow circumstances, we agree.

Id. at 364-365 (emphasis added). In upholding the I.C.C.'s power to retroactively reject an effective tariff, the Court ruled that the Commission may exercise its discretionary power if it: 1) furthers a specific statutory mandate, and 2) is directly and closely tied to that mandate. *Id.* at 367. In the opinion below, the Ninth Circuit failed to realize that only two situations would make the I.C.C. aware of a carrier's violation of the credit regulations: 1) upon the filing of a complaint by a shipper with the I.C.C. alleging discrimination; or 2) when the carrier files an undercharge claim against a shipper. *See, I.C.C. v. Transcon Lines*, 9 F.3d 64, 66-67 (9th Cir. 1993), Pet. at 6a. Even assuming that the I.C.C. relies on its discretionary power (as opposed to its explicit statutory mandate), denying the I.C.C. the power to enjoin Transcon in an undercharge context would render its credit regulations a nullity since a carrier could threaten a shipper with an undercharge claim if the shipper ceased doing business with Transcon when a credit problem occurred.

The holding in *Commercial Metals* rests on the rationale that a shipper who uses the carrier's violation of credit regulations as a defense imposes a "judicially created remedy of forfeiture of freight charges." *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 350 (1982). But the facts of the case at bar are distinguishable from *Commercial Metals*. Here, Transcon accepted the freight charges filed in its tariff, and has not been deprived of compensation for the transportation

services it provided. If Transcon wanted liquidated damages for extending credit to a shipper who did not make timely payment, it should have exercised its tariff rule within ninety days of the credit period expiration instead of waiting years later to sue a shipper for an enormous undercharge.[3]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[3] The Court noted in *Commercial Metals* that the "double payment" line of cases all involved a carrier's misrepresentation. *Commercial Metals*, at 336. *Amicus* submits that Transcon is guilty of misrepresentation by omission in not stating the applicable credit terms on the original freight bill. While the Trustee may argue that shippers are on constructive notice of all rules and rates in Transcon's tariff, *Amicus* asserts that the I.C.C. credit regulations require actual notice to the shipper of the penalty for late payment.